STATE OF NEW JERSEY

In the Matter of Monique Smith, Irvington Township, Department of Public Safety	DECISION OF THE CIVIL SERVICE COMMISSION
CSC DKT. NO. 2018-1878 OAL DKT. NO. CSV 01123-18	

ISSUED: MARCH 7, 2019 (NFA)

The appeal of Monique Smith, Police Captain, Irvington Township, Department of Public Safety, six-month suspension, on charges, was heard by Administrative Law Judge Gail M. Cookson (ALJ), who rendered her initial decision on January 31, 2019. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the exceptions and reply, as well as the ALJ's initial decision modifying the six-month suspension to a "90-day suspension," and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on March 6, 2019, accepted and adopted the Findings of Fact as contained in the attached ALJ's initial decision. However, the Commission clarified that the suspension to be imposed is a 90 working day suspension[1] and rejected the ALJ's award of counsel fees.

DISCUSSION

In the initial decision, when determining the penalty for the sustained charges, the ALJ indicated that:

I **CONCLUDE** that the penalty imposed here must be reduced

[1] It is noted that, per *N.J.A.C.* 4A:2-2.2(c), the length of a suspension in a Final Notice of Disciplinary Action, a Commission decision or a settlement when expressed in "days" **shall mean working days, unless otherwise stated.** Thus, it is important to **explicitly** express a suspension that is not to be regarded as a working day suspension as a "calendar day" suspension.

> commiserate with the charges that have not been sustained. While the actions of appellant on the evening in question were impulsive and ill-conceived, she also has no disciplinary history in her career except for a prior written reprimand. In the collateral proceedings, appellant was found not guilty of all the criminal charges except for reckless driving. Accordingly, I **CONCLUDE** that appellant should be suspended for a term of ninety (90) days.

However, the ALJ did not specify whether the reduced suspension should span 90 calendar days or 90 working days.[2] Regardless, in determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In assessing the penalty in relation to the employee's conduct, it is important to emphasize that the nature of the offense must be balanced against mitigating circumstances, including any prior disciplinary history. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007).

In this case, the appellant has only a prior written reprimand in her disciplinary history. Also, some of the underlying charges were properly dismissed in this matter. Regardless, the Commission finds that the appellant's misconduct was highly inappropriate, especially for such a high level supervisory public safety employee. Accordingly, while the Commission agrees to a reduction from the originally imposed six-month suspension, it finds that the appropriate penalty in this matter is a 90 working day suspension. This suspension should impress upon the appellant that such misconduct will not be tolerated, and any future misconduct could lead to an increased penalty up to and including removal from employment.

Since the penalty has been modified, the appellant is entitled to back pay, benefits and seniority for the difference in time between the conclusion of the 90 working day suspension and the conclusion of the originally imposed six-month suspension. *See N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. In this regard, the ALJ's award of such counsel fees in this case was

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[2] A 90 calendar day suspension is equivalent to approximately 60 working days, while a 90 working day suspension is equivalent to approximately 135 calendar days.

not appropriate, and, as such, the Commission rejects that award.[3] Pursuant to *N.J.A.C.* 4A:2-2.12(a), an award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. Mar. 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, the Commission dismissed some of the charges against the appellant, but it has sustained the other serious charges and imposed major discipline. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. In light of the Appellate Division's decision in *Dolores Phillips v. Department of Corrections,* Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the six-month suspension to a 90 working suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority for the difference in time between the conclusion of the 90 working day suspension and the conclusion of the originally imposed six-month suspension. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

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[3] A reduction in penalty may lead to an award of partial counsel fees, but only under circumstances where an appellant has prevailed on the most serious charge leaving only incidental charges, which give rise to a significantly reduced penalty, such as a minor discipline. *See e.g., Thomas Grill and James Walsh v. City of Newark,* Docket No. A-6224-98T3 (App. Div., January 30, 2001); *In the Matter of Diane Murphy* (MSB, decided June 8, 1999); *In the Matter of Joanne Chase* (MSB, decided June 24, 1997); *In the Matter of James Haldeman* (MSB, decided September 7, 1994); *In the Matter of Donald Fritze* (MSB, decided January 26, 1993). Such is not the case in this matter.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF MARCH, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 01123-18
AGENCY REF. NO. 2018-1878

IN THE MATTER OF MONIQUE SMITH, IRVINGTON TOWNSHIP, DEPARTMENT OF PUBLIC SAFETY.

Steven D. Altman, Esq., for appellant Monique Smith (Benedict and Altman, attorneys)

Lester E. Taylor, III, Esq., for respondent Irvington Township (Florio Perrucci Steinhardt & Cappelli, attorneys)

Record Closed: January 4, 2019 Decided: January 31, 2019

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE

Monique Smith (appellant) appeals from disciplinary action taken by respondent, Irvington Township, Department of Public Safety (Irvington), to suspend her from her position as a Captain in the Police Department for six months on charges of conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11). The charges relate to circumstances that occurred in the evening of her promotional ceremony, January 5, 2015, on which date several warrants were issued for appellant's arrest.

PROCEDURAL HISTORY

Appellant was suspended without pay for six (6) months effective January 6, 2015, by Preliminary Notice of Disciplinary Action handed to appellant the same day. After deferring to the collateral criminal proceedings, discussed in more detail below, Tracy Bowers, the Director of Public Safety for Irvington, served unusually as both the hearing officer and the appointing authority, entering both a decision and the Final Notice of Disciplinary Action on December 20, 2017. Appellant filed an appeal on January 2, 2018, which was granted by the Civil Service Commission on or about January 17, 2018.

The appeal was transmitted to the Office of Administrative Law (OAL), on January 22, 2018, for hearing as contested cases pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. After several case management conferences and adjournments of the hearing due to trial conflicts of counsel, the hearing was held on December 3, 2018, with a continuation on December 4, 2018, for non-testimonial issues. Post-hearing summations were permitted to be filed on January 4, 2019, on which date the record closed.

FACTUAL DISCUSSION

Detective Sergeant Gerard Malek testified on behalf of respondent. The detective has been assigned to the Irvington Internal Affairs Bureau since 2013. He has an additional ten years on the force. Sergeant Malek has had regular interactions with appellant over the years. He became aware of the domestic incident between Captain Smith and James after it occurred and monitored the situation because of her high rank. Respondent presented through this witness, the warrants and summonses issued against appellant. [Respondent's Exhibit Tabs A, B, C, D.]

Detective Sergeant Malek detailed the history of the disciplinary action taken against appellant. On January 6, 2015, respondent suspended appellant without pay pursuant to N.J.A.C. 4A:2-2.5(a)(1) because of the criminal charges issued against her

the prior evening. [Respondent's Exhibit Tab E.] On June 23, 2015, appellant was indicted on charges of Aggravated Assault, Unlawful Possession of a Weapon, Possession of a Weapon for an Unlawful Purpose, and Criminal Mischief. [Respondent's Exhibit Tab F.] On April 25, 2017, appellant was found not guilty by a jury on the Unlawful Possession of a Weapon and Possession of a Weapon for an Unlawful Purpose charges. [Respondent's Exhibit Tab M.]

On July 31, 2017, the Hon. Michael L. Ravin, J.S.C., ruled on the non-indictable motor vehicle charges in a bench trial and found appellant not guilty on the Criminal Mischief, Harassment, and Leaving the Scene of an Accident charges. However, Judge Ravin found appellant guilty of Reckless Driving. [Respondent's Exhibit Tab M.]

Detective Sergeant Malek relied primarily upon the package of documents forwarded to IA from the Essex County Prosecutor's Office after all the criminal proceedings had concluded. The incident had been referred to that office on January 8, 2015. Detective Sergeant Malek completed a report for the Loudermill hearing but his IA report was completed only on August 29, 2017. [Respondent's Exhibit Tab Q.] In addition to reviewing the prosecutor's file, he stated that he interviewed James, Jamillah Beasley-McLeod, and appellant. Nevertheless, his own report indicates that he only took the statements of Beasley-McLeod and appellant, both in late August 2017. [Respondent's Exhibit Tab Q at 14.]

In addition to the criminal actions, Detective Sergeant Malek concluded that Captain Smith was wearing her Police Uniform during all pertinent portions of the behavior alleged. This conclusion was in part based upon his interview of appellant. Detective Sergeant Malek also concluded that she entered Marlos restaurant, an establishment in which alcohol is sold, on January 5, 2015. He relied upon Beasley-McLeod's statement that she saw appellant holding two glasses of wine, although she did not observe appellant drinking. [Id. at 15.] In Detective Sergeant Malek's report, appellant denied having anything to eat or drink at Marlos. [Id. at 15.]

On cross examination, Detective Sergeant Malek explained that he was notified of the incident at approximately 11:00 p.m. on January 5, 2015. He had not been at

appellant's ceremony, held at a church, did not know who was in attendance, and never investigated that aspect of the day's events. The detective admitted that it was customary to remain in uniform for the party celebrating a promotion. It was also standard to have the party at a restaurant that serves alcohol. No one has ever been charged for being in uniform and drinking at such a celebratory event. He never inquired as to who else was there but confirmed during the hearing that the Chief and the Mayor were in attendance. There was no dispute that everyone at the restaurant raised glasses in a toast to Captain Smith. Any surveillance footage from Marlos was unavailable to either Irvington or Essex County because it had been overwritten and erased.

The Township also submitted the testimony of Director Bowers. He testified minimally, as I would not permit him to testify with respect to his role as the hearing officer below. He has been the Public Safety Director, a civilian position, since November 2015. Prior thereto, he was the Police Director for a year, also a civilian position. Bowers had twenty-three years as a uniformed officer, advancing to the rank of Captain in 2013.

Bowers testified that he has worked with appellant, having known her since she came into the department. He stated that she has had a prior letter of reprimand for a misplaced weapon earlier in her career. With respect to the current incident, Bowers only learned of it after appellant's arrest. He was not involved in the investigation. As stated above, Bowers served as the hearing officer and also the appointing agency's final decisionmaker.

Appellant opted to not present any witnesses at the hearing.

FINDINGS OF FACT

Accordingly, and based upon due consideration of the scant testimony but also the documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

1. Appellant is presently a Captain in the Irvington Police Department.

2. During 2014 and into the very early beginning of 2015, appellant was in a personal relationship with John Sharpe James (James), Councilman for the South Ward of Newark, and the son of former Newark Mayor Sharpe James.

3. Appellant was promoted to Captain on January 5, 2015, with a ceremony and a reception that followed at Marlos restaurant.

4. Appellant had expected James to come to her ceremony and reception as her significant other. He did not, in spite of texts and phone calls from appellant. Apparently, he had decided to break up with her in the days just preceding her promotion.

5. When James did not come to the ceremony or reception, appellant left the party and went to his apartment. She found him outside in his vehicle. When James saw appellant, he drove off but appellant followed him where they eventually both ended up outside the home of his parents. As detailed in the documentary evidence submitted by Irvington at this hearing, discussed below, appellant's driving was aggressive, and she was overcome with emotion. There were allegations that she struck his car with her own.

6. Appellant drove off but turned herself in after warrants were issued.

7. The newspapers carried the story of the initial incident, the eventual indictment, and then the verdict of not guilty at the ultimate criminal trial. She was charged with conduct unbecoming a public employee for bringing Irvington into disrepute. [Charge #1, FNDA; Respondent's Exhibit Tab N.]

8. Appellant was acquitted of the criminal charges, but she was found guilty of reckless driving in a bench trial before the Honorable Michael L. Ravin, J.S.C. This was the basis of her being charged with another count of conduct unbecoming. [Charge #2, FNDA; Respondent's Exhibit Tab M.] That same conviction for reckless driving

became the basis of Irvington charging appellant with other sufficient causes, specifically, failing to obey the laws of the State of New Jersey and thus violating the Internal Police Department Manual § 3.1.11, requiring such obedience. [Charge #3, FNDA; Respondent's Exhibit Tab P]

9. Appellant was found not guilty of leaving the scene of an accident and criminal mischief by Judge Ravin. Nevertheless, Irvington charged appellant with conduct unbecoming and other sufficient cause for damaging John James' vehicle during her pursuit of him, based upon its reading of Judge Ravin's bench decision. [Charges #4, #5; FNDA; Respondent's Exhibit Tab M.]

10. Because appellant was still in uniform when she was driving in pursuit of Mr. James, Irvington charged her with conduct unbecoming for violating the above-referenced Internal Police Department Manual. [Charge #6; FNDA; Respondent's Exhibit Tab P.]

11. With respect to being in uniform that evening, Irvington charged her with conduct unbecoming and other sufficient cause because she was inside Marlos, an establishment that served liquor, and presumably drank some alcohol that evening. [Charge #7 and #8, FNDA.]

12. Other high-ranking officers attended the promotional party at Marlos in uniform, including the Chief. While alcohol was undoubtedly served during this party to officers in uniform, the record was clear that this was consistent with the customary and ordinary practice for promotional events, and not unique to this one occasion. Moreover, there was no competent evidence presented that appellant consumed any alcohol at the party.

13. There was no proof that Captain Smith failed to carry her proper identification badge with her. [Charge #9, FNDA.] Moreover, insofar as the promotion had just taken place, there was also no proof that she would have been provided a new Captain's identification on the same day as the promotional ceremony.

14. Appellant has had one prior letter of reprimand in her career with Irvington.

In addition to those fact findings, I quote here and will discuss below the findings entered by Judge Ravin, at 5-7:

1. "Defendant is Irvington police officer residing in Irvington.

2. "Defendant and Mr. James were in a dating relationship which began in late October 2014.

3. "Mr. James resided in a condominium apartment on Pomona Avenue in Newark.

4. "Defendant kept clothing and other personal items in Mr. James' apartment.

5. "Defendant had keys to Mr. James' apartment.

6. "Defendant was to be promoted to the rank of police captain in a ceremony to be held the evening of January 5, 2015, to be followed by a party.

7. "Defendant anticipated that Mr. James would be present at the ceremony.

8. "On January 2, 2015, Defendant took off from work and helped Defendant prepare for her promotional ceremony.

9. "In the late afternoon of January 2, Defendant and Mr. James had an argument while sitting in Mr. James' Nissan Xterra.

10. "Mr. James decided he wanted nothing more to do with Defendant and that he was going to terminate their relationship in a manner designed to avoid personally confronting her with his decision.

11. "Following the argument, Defendant went inside Mr. James' apartment and Mr. James went elsewhere, not returning to his apartment until 1:30 a.m. on January 3, 2017.

12. "Upon his return to his apartment at 1:30 a.m. on January 3, Mr. James slept on the couch and not in the bed in which Defendant was sleeping.

13. "Mr. James left his apartment in the morning of January 3, without speaking to Defendant, determined to avoid any further contact or communication with Defendant.

14. "Knowing that Defendant would be at her promotional ceremony on January 5, Mr. James arranged to have the locks changed on his apartment so defendant could no longer have access to it, and to remove her clothing and other personal items from his apartment.

15. "At 5:00 p.m. on January 5, 2015, Mr. James sent Defendant an e-mail in which he told Defendant he was terminating their relationship and the reason why.

16. "At 5:30 p.m., Mr. James texted Defendant that she should read her e-mail.

17. "At 10:30 p.m. Mr. James drove to his apartment building to get the new set of keys from the superintendent and pay him for changing the locks.

18. "As Mr. James was sitting in his vehicle on Elizabeth Avenue near his apartment building, Defendant pulled up to Mr. James in her grey Honda Accord.

19. "With the purpose of avoiding confrontation with Defendant, Mr. James drove away, making a U-turn on Elizabeth Avenue.

20. "Defendant pursued Mr. James between Elizabeth Avenue and Wilbur Avenue in Newark.

21. "Mr. James got out of his vehicle at his parents' house on Wilbur Avenue.

22. "Defendant, still in pursuit, ran over a concrete island as she approached Mr. James' parents' house.

23. "Mr. James' father, Sharpe James, former Mayor of the City of Newark, was outside the house.

24. "Mr. James got out of his vehicle and went by his father.

25. "Defendant got out of her vehicle.

26. "Defendant was angry and was yelling at Mr. James that she loved him and flailing her arms.

27. "Mr. James went inside his parents' house and the advice of his father.

28. "Sharpe James observed that Defendant had been drinking and was highly emotional.

29. "Sharpe James offered to drive Defendant home but Defendant drove her vehicle away by herself.

30. "Defendant's Honda Accord was subsequently examined and damage was observed on the front bumper and grill, both of which were made of plastic.

31. "The rear bumper of Mr. James's Nissan Xterra was made out of metal.

32. "The height of the area of damage to the front bumper and grill of the Honda Accord was between 20 and 22 inches.

33. "The height of the rear bumper of the Nissan Xterra was between 19½ to 19¾ inches."

In addition, Judge Ravin concluded that the testimony of John James was "forthright and candid" and that he was "bereft of any intent to deceive." [Id. at 11.] Judge Ravin also factually concluded that Captain Smith's vehicle impacted that of James. He described the route of the pursuit and impact, which he set forth was corroborated by physical evidence on the damage to both vehicles as well as the "video clip in evidence demonstrating the manner in which Defendant was operating her vehicle." [Id. at 14.]

In reviewing the law on the motor vehicle charges asserted against appellant, Judge Ravin determined that the State had not proved that she had the requisite design or specific intent to damage James' vehicle. She also was held to not have knowingly damaged his car. Judge Ravin cited both the factual description of the "tap" as well as her emotional utterances at the James parental household which included her professed love for James and did not include any cursing or anger. [Id. at 18-19.] With

respect to his verdict that she was guilty of reckless driving, however, he stated that appellant "had little to no heed for the personal safety of other motorists, their vehicles or both and that her conduct posed a threat to others." [Id. at 21.]

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against her and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, Irvington bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily

dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Therefore, the tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933).

Based upon the facts set forth above, I **CONCLUDE** that the respondent has not proven by a preponderance of the credible evidence that appellant was properly charged with violating departmental rules and regulations when she attended her own promotional ceremony and party at a restaurant that served alcohol. The great weight of Irvington's own case on this charge was that this was a customary and accepted practice for officer promotions. Moreover, the Chief, other dignitaries, and high-ranking members also were in attendance, some of whom also wore their uniforms. There was zero evidence -- whether competent or hearsay -- that appellant consumed any alcohol, Accordingly, the FNDA charges #7 and #8 will be dismissed. Similarly, there is no competent evidence that appellant was missing her identification. Rather, at most the evidence only circumstantially demonstrated that she had not yet received her new Captain identification. Accordingly, FNDA charge #9 will also be dismissed.

In this case, a considerable amount of the evidence presented by respondent to support the other disciplinary charges was hearsay, to which appellant objected. While hearsay evidence is admissible, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. N.J.A.C. 1:1-15.5(b). Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony, when there is a residuum of legal and competent evidence in the record. Weston v. State, 60 N.J. 36, 51 (1971).

Respondent argues that its sources of proofs included: (1) the statements of Councilman James; (2) the Statements of former Newark Mayor Sharpe James; (3) the several findings/reports of the Essex County Prosecutor's Office; (4) the findings of Judge Ravin; and (5) Detective Sergeant Malek's independent investigation. Some of

the factual basis for said charges were corroborated by Detective Sergeant Malek's own interview of appellant. [See Respondent's Exhibit Tab Q at 14-16.] Irvington asserts that its documentary evidence, therefore, is admissible because several reports were prepared in the ordinary course of law enforcement's business, and some were based on interviews of persons with actual knowledge including the victim, several eyewitnesses, and Captain Smith herself. [Id. at 6-9, 14-16.]

Appellant was convicted of Reckless Driving but was found not guilty of Leaving the Scene of an Accident or Criminal Mischief by Judge Ravin. As stated above, she was acquitted of all indictable charges by the jury. Accordingly, this disciplinary action comes down to the charges based on appellant's reckless driving and pursuit of James, and the embarrassing press coverage of the incident and trials.

While Captain Smith has no control over what gets printed in a newspaper, her reckless and emotional conduct that evening of driving after James into Newark was such that it should have occurred to her that it might be newsworthy and embarrassing to the city. Irvington argues that "[w]hether or not the substance of the allegations are [sic] true, Captain Smith's conduct, arrest, and trial resulted in a plethora of poor publicity upon Irvington's Police Department." [Letter-Brief at 11.]

The pertinent portions of the Irvington Police Department Manual provide:

> 3.1.1 Standards of Conduct. Members and employees shall conduct their private and professional lives in such a manner as to avoid bringing the police department into disrepute.

I **CONCLUDE** that respondent has proven FNDA Charge #1 by a preponderance of the credible and admissible evidence.

On the disciplinary charges based upon appellant's driving behaviors, respondent argues that Judge Ravin's findings of facts should be judicially noticed for purposes of this proceeding given the higher burden of proof in criminal proceedings. Notwithstanding its claim that this hearing contained sufficient factual evidence to also support a finding that Captain Smith drove her vehicle on the wrong side of the road,

and contacted John James' vehicle with her own, there was little evidence adduced that was not derivative of the prior criminal proceedings. Appellant also argues that respondent never properly requested that this forum take judicial notice of Judge Ravin's decision.

For the reasons set forth below and almost entirely based upon Judge Ravin's decision, I **CONCLUDE** that Irvington has proved by a preponderance of the credible evidence that Captain Smith drove recklessly, including some minor contact with the vehicle of her former boyfriend. However, before discussing the determinations of Judge Ravin, I must **CONCLUDE** that almost all of the other documents relied upon by Irvington are inadmissible as hearsay. Irvington argues that an investigator's report is likely to be reliable because it was prepared and preserved in the ordinary course of the operation of a business or governmental entity. See generally Biunno, supra, Current N.J. Rules of Evidence, comment 1 on N.J.R.E. 803(c)(6); comment 2 on N.J.R.E. 803(c)(8). While a prosecutor's investigation report may be created in the ordinary course of its business, that does not mean that embedded hearsay is thereby admissible under Weston.

Although it is not disputed here that the statements were taken as part of the Essex County Prosecutor's Office regular business activity to conduct investigations; nevertheless, such a report is generally not admissible to prove the contents of statements provided to an investigator. Biunno, supra, Current N.J. Rules of Evidence, comment 4 on N.J.R.E. 803(c)(6). Determining that the statement qualifies as a business record does not end the inquiry because "a statement included within an otherwise admissible record or report may itself constitute inadmissible hearsay." Ibid.; see also In re Registrant C.A., supra, 146 N.J. at 98 (declarant-victim's statements to the police included in police reports were not admissible under 803(c)(6)). The notion of reliability is underscored by the fact that neither appellant nor I have had any opportunity to review and question the collision experts or any of the witnesses whose statements were taken by the Prosecutor's Office. This trial testimony was merely summarized by Detective Sergeant Malek's readings of the transcripts. Having been acquitted of every indictable and non-indictable offense except reckless driving, appellant is entitled to a de novo hearing in this forum.

With respect to Judge Ravin's decision, respondent seems to have gotten stuck on the notion of "judicial notice;" however, neither party addressed the legal "elephant in the room;" that is, whether appellant is collaterally estopped to deny the fact-finding by Judge Ravin in his bench opinion. In general, that doctrine states:

> For the doctrine of collateral estoppel to apply to foreclose the relitigation of an issue, the party asserting the bar must show that: (1) the issue to be precluded is identical to the issue decided in the prior proceeding, see Pittman v. LaFontaine, 756 F. Supp. 834, 841 (D.N.J. 1991) (stating that for issue to be precluded subsequent action must involve substantially similar or identical issues); (2) the issue was actually litigated in the prior proceeding, see ibid. (stating that "the litigant against whom issue preclusion is invoked must have had a full and fair opportunity to litigate the issue in the previous tribunal"); (3) the court in the prior proceeding issued a final judgment on the merits, see State v. Redinger, 64 N.J. 41, 45, 312 A.2d 129 (1973)(stating that collateral estoppel applies when "issue of ultimate fact has [ ] been determined by a valid and final judgment . . . "); (4) the determination of the issue was essential to the prior judgment, see Warren Township v. Suffness, 225 N.J. Super. 399, 408, 542 A.2d 931 (App. Div.) (stating that "[c]ollateral estoppel applies . . . to those [matters and facts] necessary to support the judgment rendered in the prior action"), certif. denied, 113 N.J. 640, 552 A.2d 166 (1988); and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding. See Wunschel v. City of Jersey City, 96 N.J. 651, 658, 477 A.2d 329 (1984) (stating, "Central to the application of the doctrine [of collateral estoppel] is that the party against whom the doctrine is to be invoked must have been party to or privy to the prior proceedings.").
>
> [In re Estate of Dawson, 136 N.J. 1, 20-21 (1994).]

These well-established principles have been applied to indictable charges and municipal motor vehicle violations. A case directly on point is State v. Gadson, 2014 N.J. Super. Unpub. LEXIS 2964 (2014 App. Div.)[1]:

[1] While this decision is unpublished and therefore not available as established precedent, it cites itself to the well-established principles being applied therein, and here.

The principle of collateral estoppel is part of the Fifth Amendment's guarantee against double jeopardy. Ashe v. Swenson, 397 U.S. 436, 445, 90 S. Ct. 1189, 1195, 25 L. Ed. 2d 469, 476 (1970). Collateral estoppel is "simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit." Id. at 443, 90 S. Ct. at 1194, 25 L. Ed. 2d at 475. In the criminal context, this means that:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.
>
> [Id. at 444, 90 S. Ct. at 1194, 25 L. Ed. 2d at 475-76 (citation and internal quotation marks omitted).]

Motor vehicle offenses under Title 39 are not indictable offenses but "are within the category of offenses subject to the Double Jeopardy Clause" because they are "quasi-criminal in nature" and "must be proved beyond a reasonable doubt." State v. Dively, 92 N.J. 573, 585-86, 458 A.2d 502 (1983).

* * * *

Our court rules require that when a defendant is charged with both indictable and non-indictable offenses "based on the same conduct or arising from the same episode . . . the Superior Court judge shall sit as a municipal court judge on the complaint and shall render the verdict with respect to the [non-indictable offense] on the proofs adduced in the course of trial." R. 3:15-3(a)(1)-(2); see also State v. Muniz, 118 N.J. 319, 327-28, 571 A.2d 948 (1990) (stating that indictable charges and motor vehicle charges are to be "joined in a single trial but . . . the jury would decide guilt on the [indictable charge] and the judge . . . would decide the [motor vehicle] charge").

If "the factual finding[s] represented by the jury's verdict necessarily constitutes a nonfinding of the factual predicate

> for the [motor vehicle] offenses, the court would then be precluded by double jeopardy principles from reexamining the same body of evidence to come to a contrary conclusion." Muniz, supra, 118 N.J. at 334 (citing Illinois v. Vitale, 447 U.S. 410, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980)). In other words, a judge cannot reach factual conclusions which are contradictory to the jury's verdict.
>
> [Id. at *4-6]

In Gadson, the Appellate Division reviewed the elements of the non-indictable motor vehicle offenses in comparison to those of the indictable offenses on which that defendant had been acquitted and ruled that one motor vehicle offense would be upheld and the other reversed. Here, there has been no appeal filed from Judge Ravin's determinations, so I must accept them as having been previously adjudicated against appellant, after she had a full and fair opportunity to be heard.

Accordingly, I **CONCLUDE** that there has been credible proof presented that appellant recklessly pursued James in her vehicle and that the necessary supporting facts of such were incorporated into his finding of her guilt on the reckless driving charge. I **CONCLUDE** that respondent has sustained FDNA Charges #2 and #3. Charges #4 and #5 should be merged and dismissed because of appellant's acquittal of criminal mischief by Judge Ravin. He had determined that there was not proof beyond a reasonable doubt of intentionally or knowingly tapping James' vehicle. Any facts of contact between the vehicles was relevant to the criminal mischief offense. Insofar as that was dismissed by Judge Ravin, I **CONCLUDE** that Irvington may not herein rely upon facts or elements relating only to criminal mischief.

I must determine, therefore, the appropriate discipline on Charges #1, #2 and #3.[2] Progressive discipline is the touchstone of our civil services laws, even with respect to para-military organizations. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be

[2] I **FIND** that the fact that appellant was in uniform while in her vehicle was merely presumed in FNDA Charge #6 and no evidence of such was presented by Irvington. I **CONCLUDE** that this charge has not been sustained.

an appropriate analysis for determining the reasonableness of the penalty.[3] See Bock, supra, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential. In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, or a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

I **CONCLUDE** that the penalty imposed here must be reduced commiserate with the charges that have not been sustained. While the actions of appellant on the evening in question were impulsive and ill-conceived, she also has no disciplinary history in her career except for a prior written reprimand. In the collateral proceedings, appellant was found not guilty of all the criminal charges except for reckless driving. Accordingly, I **CONLCUDE** that appellant should be suspended for a term of ninety (90) days.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action of Irvington Township, Department of Public Safety, against appellant Monique Smith is hereby **REVERSED IN PART** and **AFFIRMED IN PART** consistent with the decision set forth above. It is further **ORDERED** that appellant

[3] The fact that evidence of similar disciplinary actions against others was not submitted by the respondent does not mean that appellant cannot be charged. That is a version of "whataboutism" that has no place in this proceeding.

Monique Smith is entitled to back pay and any other benefits that would have otherwise accrued had she not been suspended beyond ninety (90) days.

It is further **ORDERED** that fifty (50%) percent of reasonable counsel fees should be awarded to the appellant as the prevailing party, subject to submittal of an affidavit of services and supporting documentation to the appointing agency, if settlement of fees is not successful, in accordance with N.J.A.C. 4A:2-2.12.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 31, 2019

Gail M Cookson

DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

id

APPENDIX

LIST OF WITNESSES

For Appellant:

None.

For Respondent:

Gerard Malek

Tracy Bowers

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

None.

For Respondent:

Tab A	Warrant 0714-W-2015-000257
Tab B	Warrant 0714-W-2015-000258
Tab C	Summons 0714-AV-404226
Tab D	Summons 0714-AV-404227
Tab E	Order 15-01; and Preliminary Notice of Disciplinary Action, dated January 6, 2015
Tab F	Indictment 2015-6-1426
Tab G	Correspondence re Loudermill Hearing
Tab H	[not in evidence]
Tab I	Essex County Prosecutor's Office Report, dated October 11, 2016
Tab J	[not in evidence]
Tab K	DVD entitled #3 1044 Bergen Street"
Tab L	[not in evidence]
Tab M	Superior Court of New Jersey, Decision and Order, Hon. Michael L. Ravin, J.S.C., dated July 28, 2017
Tab N	Newspaper Articles
Tab O	[not in evidence]

Tab P	Irvington Police Manual, Chapter 3
Tab Q	Irvington Internal Affairs Bureau, Supplemental Report, dated August 29, 2018
Tab R	Preliminary Notice of Disciplinary Action, dated September 7, 2017
Tab S	[not in evidence]
Tab T	Final Notice of Disciplinary Action, dated December 20, 2017